No. 75-796

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM L. HAMLING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that they are entitled to new trials on the basis of newly discovered evidence and that the indictment must be dismissed because the grand jury that returned it considered "national standards" rather than "local community standards." Petitioners Hamling and Kemp also claim that they should have been sentenced to probation.

After a jury trial in 1971 in the United States District Court for the Southern District of California, petitioners were convicted of twelve counts of mailing and conspiring to mail an obscene advertisement, in violation of 18 U.S.C. 2, 1461 and 371. Petitioner Hamling was sentenced to one year's imprisonment on the conspiracy count, to be followed by concurrent terms of three years' imprisonment on each of the eleven substantive counts; he was also fined $32,000. Petitioner Kemp was sentenced

to imprisonment for one year and a day on the conspiracy count, to be followed by concurrent terms of two years' imprisonment on each of the eleven substantive counts, all subject to immediate parole eligibility pursuant to 18 U.S.C. 4208(a)(2). Petitioners Wright and Thomas received suspended sentences of one and one-half years and were placed on probation for five years. Petitioners Reed Enterprises, Inc., and Library Service, Inc., were fined $43,000 and $12,000, respectively. The court of appeals affirmed. 481 F.2d 307. After plenary review this Court affirmed on the merits. 418 U.S. 87.

Petitioners then filed motions for a new trial and to vacate their convictions, pursuant to 28 U.S.C. 2255 and Fed. R. Crim. P. 33. Petitioners Hamling and Kemp also moved to suspend their sentences and requested probation under 18 U.S.C. 3651 and Fed. R. Crim. P. 32(e). The district court denied these motions and the court of appeals affirmed (Pet. App. A; 525 F.2d 758).

The evidence at petitioners' trial, which is summarized in this Court's prior opinion (418 U.S. at 91-96), established that petitioners mailed approximately 55,000 brochures advertising a publication entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography."

> The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction

> of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with the other's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina. [481 F.2d at 316-317.]

Petitioners' trial occurred prior to the decision in *Miller* v. *California*, 413 U.S. 15. This Court held, *inter alia*, that the standards established in *Miller* did not require the reversal of petitioners' convictions (418 U.S. at 101-117).

1. Petitioners contend that they are entitled to a new trial on the basis of "newly discovered" evidence. They contend that they could prove that the contemporary community standards of the San Diego area, where they were tried, are more tolerant of sexual literature than are national standards, and that the brochure is acceptable to San Diego residents. This evidence, however, was available to petitioners at the time of trial and therefore is not newly discovered. Moreover, the district court properly found that the evidence would have been merely cumulative to evidence introduced at trial and could not have influenced the jury (H. Tr. 43).[1]

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[1]Judge Thompson, who denied petitioners post-trial motions, was the trial judge in this case.

"Tr." refers to the thirty-one volume transcript of the trial. "H. Tr." refers to the one volume transcript of the hearing on petitioners' post-trial motions on December 16 and 24, 1974.

The evidence consisted of two affidavits.[2] One affidavit, by Jack Haberstroh (who had testified as a defense witness at petitioner's trial (Tr. 3941-4045)), expressed the opinion that the brochure does not go beyond the customary limits of candor in the San Diego community and that it is not patently offensive to local community standards. That opinion was based upon a survey conducted by Haberstroh's student, Virginia Carlsen, in which the brochure was shown to selected residents of San Diego. In the second affidavit Dr. Gene Norman Levine stated his opinion that the San Diego community is more tolerant than the nation toward explicit materials. That opinion is based upon a portion of a 1970 survey relating to attitudes toward sexual materials in which the responses of San Diego residents are compared to responses to a national survey.

In part, petitioners' contention that these affidavits require a new trial has already been rejected by this Court. The Carlsen survey discussed in the Levine affidavit was offered but not admitted at trial (Tr. 3923-3933). This Court specifically held that the exclusion of that evidence did not constitute reversible error. 418 U.S. at 108-110. The Haberstroh affidavit merely presents the same sort of evidence through a different light; that evidence is neither

[2]In a third affidavit petitioner's trial counsel stated that his trial strategy would have been different if he had known that local rather than national standards were to be applied, and that a verdict of not guilty or a hung jury would have resulted had the trial occurred under local standards. That affidavit, however, presented no evidence in support of its assertions.

newly discovered nor sufficient to justify repetitious review by this Court.[3]

2. Petitioners claim (Pet. 25-27) that the indictment is defective because the grand jury did not consider the brochure here in light of the local standards test of *Miller*. The court below correctly observed that this is the same contention asserted by petitioners in seeking a new trial (Pet. App. 3). If, as we submit, petitioner's convictions are valid, then the indictment is valid.

Petitioners also assert that the failure of the indictment to charge that the brochure was offensive to "community standards" requires dismissal of the indictment for failure to charge an essential element of the offense. This claim has been rejected by this Court, which held (418 U.S. at 119) that the "constitutional definition of obscenity need not be alleged in the indictment."

[3]To the extent that Haberstroh's opinion is based on the survey of materials available in the San Diego area, we note that the "[m]ere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *United States* v. *Manarite*, 448 F.2d 583, 593 (C.A. 2), certiorari denied, 404 U.S. 947 (quoted at 418 U.S. at 126). In any event, "[t]he District Court permitted Dr. Wilson, one of the four expert witnesses who testified on behalf of petitioners, to testify as to materials he found available in San Diego, as a result of having spent several days there. Tr. 3575." 418 U.S. at 109. Evidence of comparable materials is thus merely cumulative. Petitioners quote (Pet. 13) our statement (Br. for the United States at 30 in No. 73-507) that "[p]etitioners could have benefited from the application of a local standard only on the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole." While a showing of more tolerant local standards raises the possibility of benefit to petitioners, the district court has found that the evidence of local standards would not benefit petitioners here. In light of that finding, our present position is not inconsistent with the prior statement.

3. Petitioners Hamling and Kemp contend (Pet. 27-29) that they should not have been sentenced to imprisonment. The sentences, however, are well within the statutory maxima. Appellate review of their severity is therefore unavailable. *Dorszynski* v. *United States*, 418 U.S. 424, 431.

Petitioners' claim (Pet. 4), which is not elaborated upon in the petition, that their imprisonment is cruel and unusual punishment, appears to be concerned with matters appropriate for consideration by the sentencing judge in determining the proper penalty. Nothing relied upon by petitioners raises a constitutional issue in this regard. Cf. *Badders* v. *United States*, 240 U.S. 391.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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